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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES G. RENO, : CONSOLIDATED UNDER  
 : MDL 875  
Plaintiff, :  
 : Transferred from the  
 : Western District of  
v. : Wisconsin  
 : (Case No. 01-00189)

**FILED**

AC AND S, INC.  
et al.,

JUN 25 2013 E.D. PA CIVIL ACTION NO.  
2:09-60293-ER *File*

Defendants.

MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_, Dep. Clerk

O R D E R

AND NOW, this 24th day of June, 2013, it is hereby  
ORDERED that the Motion for Summary Judgment of Defendant Owens-  
Illinois Corp. (Doc. No. 132) is **GRANTED in part; DENIED in part.**<sup>1</sup>

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<sup>1</sup> This case was transferred in January of 2009 from the United States District Court for the Western District of Wisconsin to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that he was exposed to asbestos and became ill as a result. In October of 1984, Plaintiff learned he had pleural thickening but, as late as March of 1993, medical testing revealed that his pulmonary function was normal. In February of 2001, Plaintiff was diagnosed with asbestos-related pleural disease and, in March of 2001, medical tests confirmed restrictive breathing. In March of 2001, Plaintiff filed his Complaint, alleging an "asbestos-related condition," which he identified as "pleural thickening." In 2005, he was diagnosed with asbestosis. Plaintiff never amended his Complaint to include a claim for asbestosis. However, he contends that, during discovery, he notified Defendant of his asbestosis diagnosis.

Plaintiff has brought claims against various defendants. Defendant Owens-Illinois Corp. ("Owens-Illinois") has moved for summary judgment, arguing that (1) Plaintiff's claims (for both pleural thickening and asbestosis) are barred by the Wisconsin statute of limitations, and (2) Plaintiff has failed to identify sufficient evidence of conspiracy to support a claim for conspiracy. The parties agree that Wisconsin law applies.

## I. Legal Standard

### A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

### B. The Applicable Law

#### 1. Procedural Matters (Federal Law)

In multidistrict litigation, "on matters of procedure, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009) (Robreno, J.). Therefore, in addressing the procedural matters herein, the Court will apply federal law as interpreted by the Third Circuit Court of Appeals. Id.

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2. Substantive Matters (State Law)

The parties have agreed that Wisconsin substantive law applies in these cases. Therefore, this Court will apply Wisconsin law in deciding Defendant's Motions for Summary Judgment in those cases. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Amendments to Pleadings (Federal Rules of Civil Procedure 15 and 16)

Amendments to pleadings are governed by Rules 15 and 16 of the Federal Rules of Civil Procedure. Rule 15 permits parties to amend their pleadings only once as a matter of course, within 21 days after service of the initial complaint or the filing of a responsive pleading/motion. Fed. R. Civ. P. 15(a)(1). All further amendments require the leave of the court which it should "freely give . . . when justice so requires." Id. R. 15(a)(2). If, however, a motion to amend is filed after the Court ordered deadline for amendments has passed, the moving party must demonstrate good cause for the amendment. Id. R. 16(b)(4). "Good cause" under Rule 16(b) focuses on the diligence of the party seeking the modification of the scheduling order. See Fed. R. Civ. P. 16, Advisory Committee Note (1983) ("the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension").

Once good cause is shown, a court may determine whether justice requires the amendment under Rule 15. A district court has discretion to deny such a request, "if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith, or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 116 (3d Cir. 2003). "In determining whether a claim would be futile, the district court applies the same standard of legal sufficiency as [it] applies under Federal Rule of Civil Procedure 12(b)(6)." Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 243 (3d Cir. 2010) (internal citations and quotations omitted).

D. Relation Back of Claims (Federal Rule of Civil Procedure 15)

Under Federal Rule of Civil Procedure 15(c)(1)(B), an amendment to a pleading relates back to the date of the original pleading where the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading. Glover v. FDIC, 698 F.3d 139, 145 (3d Cir. 2012). Relation back is structured to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. Id. (citing Krupski v. Costa Crociere S.p.A., --- U.S. ---, 130 S. Ct. 2485, 2494, 177 L.Ed.2d 48 (2010)). Where an amendment relates back, Rule 15(c) allows a plaintiff to sidestep an otherwise-applicable statute of limitations, thereby permitting resolution of a claim on the merits, as opposed to a technicality. Id. At the same time, Rule 15(c) endeavors to preserve the important policies served by the statute of limitations - most notably, protection against the prejudice of having to defend against a stale claim, as well as society's general interest in security and stability - by requiring that the already commenced action sufficiently embraces the amended claims. Id.

Application of Rule 15(c)(1)(B) normally entails a "search for a common core of operative facts in the two pleadings." Id. It is well-established that the touchstone for relation back is fair notice, because Rule 15(c) is premised on the theory that "a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." Id. at 146 (quoting Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 149 n.3, 104 S. Ct. 1723, 80 L.Ed.2d 196 (1984)). Thus, only where the opposing party is given "fair notice of the general fact situation and the legal theory upon which the amending party proceeds" will relation back be allowed. Id.

## II. Defendant Owens-Illinois's Motion for Summary Judgment

### A. Defendant's Arguments

#### Conspiracy Claims

Defendant Owens-Illinois argues that Plaintiff has failed to identify sufficient evidence to support a claim of conspiracy under Wisconsin law.

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Statute of Limitations / "Two-Disease Rule"

Defendant Owens-Illinois argues that Plaintiff's claims are barred by the Wisconsin statute of limitations because (1) Plaintiff learned he had pleural thickening over 16 years before he filed his complaint (thus barring the entire action), (2) even if the entire action is not barred, his asbestosis claims are barred because he received a diagnosis of asbestosis in 2005, but did not amend his complaint as required.

With respect to the claims based on pleural thickening, Defendant argues that the statute of limitations began to run when Plaintiff learned he had pleural thickening - and that he was obligated to exercise diligence to investigate this diagnosis to determine the cause (asbestos) at the time of that initial diagnosis.

With respect to the claims based on asbestosis, Defendant contends that (a) Wisconsin recognizes the "two disease rule" (a.k.a. "separate disease rule") such that Plaintiff was required to file a second, separate claim/case (or amend the existing complaint) for the subsequent asbestosis diagnosis, and (b) more than 3 years passed after the time of the "new" diagnosis without a separate claim/case (or amended complaint) being filed for the "new" asbestosis diagnoses within that 3-year period provided for by the Wisconsin statute of limitations. In support of its assertion that Plaintiff was required to file a new claim/case (or amend its existing complaint to reflect the "new" diagnosis), Defendant Owens-Illinois relies upon Sopha v. Owens Corning Fiberglas Corporation GAF, 230 Wis.2d 212 (Wis. 1999).

In its reply brief, Defendant responds to Plaintiff's argument (raised in his opposition) that Wisconsin law does not recognize a claim for pleural thickening (where it is not accompanied by functional impairment). Defendant disputes Plaintiff's assertion by pointing to Sopha v. Owens Corning Fiberglas Corporation GAF, which Defendant asserts states that the "decision whether a claimant can recover for pleural thickening or asbestosis must be made by the circuit court on a case by case basis." 230 Wis.2d 212, 243 (Wis. 1999). Defendant argues that Plaintiff's claims based on "pleural thickening" (the only specifically identified diagnosis in the Complaint) are barred (a) if actionable, because they were not timely, and



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(b) if not actionable, because they are not actionable such that the entire action should be dismissed (and that any claims based on asbestosis are barred by Wisconsin's alleged recognition of the "two disease rule" (a.k.a. "separate disease rule") and Plaintiff's failure to amend the complaint to include the second diagnosis).

## **B. Plaintiff's Arguments**

### Conspiracy Claims

Plaintiff concedes that he is not opposing Defendant's motion as to his conspiracy claims.

### Statute of Limitations / "Two-Disease Rule"

In response to Defendant's argument that Plaintiff's statute of limitations began to run in 1984, when he learned of his pleural thickening, Plaintiff asserts that he had no cause of action until much later (2001), when he (1) received a diagnosis of asbestos-related pleural disease (by the expert report of Dr. Alvin Schonfeld) and (2) received his first medical test showing functional impairment (restrictive breathing), because Wisconsin law does not allow a claim for pleural thickening that is not accompanied by functional impairment, and does not begin a statute of limitations until a plaintiff learns (or should have learned) of the cause of his illness by way of medical diagnosis/opinion. In support of these arguments, Plaintiff relies upon (1) Borello v. U.S. Oil Co., 130 Wis.2d 397 (1986) (which Plaintiff contends indicates that Wisconsin recognizes a discovery rule in which a statute of limitations does not begin to run until a Plaintiff learns of the cause of his illness (or should have learned of the cause of his illness) as diagnosed by a medical expert), and (2) this Court's decision in In re Asbestos Litigation (VI) (Nov. 14, 2011 E.D. Pa.) (Robreno, J.) (Plaintiff's Exhibit 7, appearing as ECF No. 154-9) (predicting that, under Illinois law, pleural plaques and pleural thickening are not cognizable injuries).

Furthermore, Plaintiff argues that a recovery for asbestosis is not precluded because (1) there is nothing that requires an amendment to the complaint to reflect the subsequent asbestosis diagnosis (as the claim set forth in Plaintiff's existing complaint encompasses a claim for asbestosis), and

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(2) even if there were such a requirement, Wisconsin law allow complaints to be amended freely and liberally (pursuant to Wisconsin statute § 802.09(4) and related case law). Plaintiff contends that this amendment would be permitted under Wisconsin law under the circumstances at hand because Defendant had notice of the "updated" asbestosis diagnosis long ago (when depositions were taken, when discovery responses were served, and when disclosures were made pursuant to A012), such that (3) Defendant cannot claim there was any surprise or accompanying prejudice to it at the summary judgment stage. Plaintiff contends that the discovery phase in this case was conducted based upon an asbestosis diagnosis. It is his position that the A012 filings identifying Plaintiff's asbestosis diagnosis had the effect of amending the complaint to include a claim for asbestosis, such that there was no need for Plaintiff to file an amended complaint. Plaintiff also (4) cites to Wisconsin statute § 802.09(2), which he contends allows amendments to pleadings to conform to the evidence, even as late as trial, so long as Defendant will not be prejudiced in maintaining its defense on the merits. Plaintiff cites to Korkow v. General Casualty Company of Wisconsin, 117 Wis.2d 187, 194 (Wis. 1984), which he contends makes clear that § 802.09 operates in a fashion similar to Federal Rule of Civil Procedure 15, and liberally allows amendments to pleadings.

### C. Analysis

#### Conspiracy Claims

Plaintiff concedes that he is not opposing Defendant's motion as to his conspiracy claims. Therefore, there is no genuine dispute of material fact regarding these claims, and summary judgment in favor of Defendant is warranted as to these claims. See Anderson, 477 U.S. at 248-50.

#### Statute of Limitations / "Two-Disease Rule"

The parties agree that the statute of limitations applicable to Plaintiff's claims is three (3) years. See Wisconsin Statute § 893.54. The parties agree that Wisconsin recognizes a "two disease rule" (sometimes referred to as a "separate disease rule" or "multiple disease rule"). See Sopha v. Owens Corning Fiberglas Corporation GAF, 230 Wis.2d 212, 227 (Wis. 1999). Therefore, the issues presented by Defendant's

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motion are (1) whether Plaintiff's pleural thickening was actionable prior to his development of accompanying functional impairment, (2) whether Plaintiff was required to amend the complaint to include a claim for asbestosis and, (3) if so, (a) whether Plaintiff is permitted to do so now (b) such that the asbestosis claim will relate back to the original claim and therefore is not barred by the statute of limitations.

(i) Claim for Pleural Thickening

With respect to Plaintiff's claim for pleural thickening, Defendant has argued that Plaintiff's condition was actionable when he first learned of it in 1984 (and that the statute of limitations on that claim began to run at that time), even though he did not experience any accompanying functional impairment (restrictive breathing) until much later in 2001. Under Wisconsin law, a claim for pleural thickening without functional impairment is not actionable because, until functional impairment occurs, a plaintiff has suffered no recoverable damages. Sopha, 230 Wis.2d at 226-32. Therefore, a plaintiff's statute of limitations on a claim for pleural thickening begins to run when the plaintiff experiences functional impairment as a result of that condition. Id. Consequently, Plaintiff's claim for pleural thickening was timely filed and is not barred by the Wisconsin statute of limitations.

(ii) Claim for Asbestosis

Plaintiff has presented no evidence that his asbestosis has arisen from a pathology separate from that of his pleural thickening - and he does not appear to dispute that the two conditions have arisen from separate pathologies. Under these circumstances, this Court construes Sopha to require Plaintiff to bring a claim for asbestosis that is separate from Plaintiff's claim for "asbestos-related condition," specifically identified as "pleural thickening." Plaintiff concedes that no such claim has been brought in the existing complaint. Therefore, Plaintiff may only obtain a recovery based upon the asbestosis diagnosis (rather than a recovery based solely upon the diagnosis of "pleural thickening"), if (1) Plaintiff is now permitted to amend the complaint, and (2) the new claim in the amended complaint relates back to the original claim.

Because Plaintiff's motion to amend was not brought until the summary judgment phase of the case (i.e., after the



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Court ordered deadline for amendments passed), Plaintiff must demonstrate good cause for the amendment. Fed. R. Civ. P. 16(b)(4). Plaintiff contends that the reason the complaint was not amended prior to the deadline for amendments is that it was the understanding of counsel that, in light of the Court's AO12 procedural requirements, no amendment was necessary because Defendant was notified of Plaintiff's asbestosis by way of the AO12 disclosures (and other discovery). Plaintiff cites no authority from this Court (or elsewhere) to support this understanding. The Court has never indicated to counsel for Plaintiff (or any other party or counsel appearing in the MDL) that discharge of AO12 obligations relieves a party of complying with the Federal Rules of Civil Procedure. The Court cannot conclude that the misunderstanding of counsel for Plaintiff constitutes "good cause" for failing to seek leave to amend the complaint in this action prior to the deadline for doing so.

Even if good cause was stated under Rule 16, under Rule 15, the defendant would be unfairly prejudiced in that it conducted discovery and it has already filed the motion for summary judgment based on the allegations set forth in the initial complaint. Moreover, the interests of justice would not be served in that, in this large MDL consisting of thousands of cases and literally millions of claims, adherence to the Court's scheduling orders is essential to the management of the cases. See In re Asbestos Products Liability Litigation (No. VI), -- F.3d --, 2013 WL 2364088, at \*7 (3d Cir. May 31, 2013) (citing the need for strict adherence to scheduling orders in MDL cases). Accordingly, Plaintiff's request to amend the complaint at this time is denied.

In light of this determination, the Court need not consider whether the proposed claim for asbestosis would relate back to the original claim such that it would be deemed timely.

Because there is no claim for asbestosis in the present action, Plaintiff may not recover for the diagnosis of asbestosis and is instead permitted only to pursue and recover for the existing claim for "pleural thickening" with functional impairment. Accordingly, the case will proceed toward trial based only on that existing claim.

E.D. PA NO. 2:09-60293-ER

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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**D. Conclusion**

Summary judgment in favor of Defendant is granted as to Plaintiff's claims for conspiracy and asbestosis. Summary judgment in favor of Defendant is denied as to Plaintiff's claim for pleural thickening.